

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In Re:	§	
	§	
DEEP MARINE HOLDINGS, INC.	§	Case No. 09-39313
et al.	§	
	§	Jointly Administered Chapter 11
	§	
Debtors.	§	

DEEP MARINE HOLDINGS, INC.,	§	
and DEEP MARINE TECHNOLOGY	§	
INCORPORATED	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	Adversary No. 10-3026
	§	
FLI DEEP MARINE LLC, BRESSNER	§	
PARTNERS, LTD., LOGAN	§	
LANGBERG, HARLEY LANGBERG,	§	
and DEEPWORK, INC.	§	
	§	
Defendants.		

**DEFENDANTS' REPLY TO MOTION OF PAUL MCKIM FOR ENTRY OF ORDER
REGARDING SUBPOENA AND DEBTORS' OBJECTION/RESPONSE TO THE MOTION**

Defendants FLI Deep Marine LLC, Bressner Partners, Ltd., Logan Langberg and Harley Langberg (the "Defendants") hereby respectfully file this reply to (i) the motion of Paul McKim for entry of an order regarding subpoena (the "McKim Motion") and (ii) Debtors' objection/response to the McKim Motion ("Debtors' Objection").

Preliminary Statement

1. When this Court issued the temporary restraining order (the "TRO") and scheduled the preliminary injunction hearing (the "Hearing"), the purpose was to stay all proceedings until the ownership of the causes of action (the "Claims") asserted by the Defendants in FLI Deep Marine LLC et al. v. Paul McKim et al., Delaware Chancery Court, Civil Action No. 5020-VCS (the "Delaware Action") was determined.

2. The Defendants issued a subpoena to Paul McKim ("McKim"), the founder and former CEO of the Debtors who has made allegations similar to the Claims, seeking to require McKim to produce a copy of the 2009 report of the Debtors' Special Committee (the "Report") that he has in his possession. McKim's attorneys advised Defendants that McKim's copy of the Report was under seal by order of the Texas State Court, and that they would seek advice from this Court on how to proceed.

3. Defendants believe that it is vital for them to review a copy of the Report prior to the Hearing if they are to be able to fully make their case regarding ownership of the claims. The scope of the Special Committee's investigation and Report was purportedly wide ranging and, upon information and belief, analyzed claims made by Defendants against Nasser Kazeminy ("Kazeminy") and Otto Candies, Jr. ("Candies") in their individual capacity that resulted in wrongs committed by them as individuals against the Defendants that did not flow through

the Debtor. Any such claims, by definition, would be direct claims that are owned by the Defendants.

4. If the Court were to follow the logic of the Debtors, the Defendants would be placed in the ultimate "Catch – 22": the Defendants would only get access to the Report if the Court rules that the Claims belong to Defendants, but Defendants ability to articulate and prove that the Claims belong to them will, upon information and belief, be aided by access to the Report.

The Subpoena Does Not Violate the Automatic Stay or the TRO

5. The Debtors assert that "[t]he SLC Report relates solely to the merits of the Delaware Causes of Action" and therefore the attempt to subpoena McKim's copy of the Report violates the automatic stay and the TRO. (Debtors' Obj. ¶ 2). Yet, the CRO has testified that even he has requested and not seen the Report. Thus since neither the CRO nor the Defendants have never seen the Report there is no way of knowing if the assertion made by Debtors' counsel is true. The Defendants need to see a copy of the Report prior to the Hearing if Defendants are truly to have the opportunity to make their case for direct ownership of certain of the Claims.

6. The Defendants issued the subpoena from this Court and will abide by the ruling of this Court as to the whether the Report can be produced. Thus, the subpoena was issued in the context of this pending adversary proceeding and, therefore, cannot possibly be a violation of the automatic stay or the TRO, which

prohibits Defendants from prosecuting any lawsuit other than the case presently before the Court.

Production of the Report to the Defendants Is Not ‘Full Disclosure’

7. The Debtors assert that because the court in Paul McKim, Individually and Derivatively on behalf of Nominal Defendants Deep Marine Holdings, Inc. and Deep Marine Technology, Inc., v. Nasser Kazeminy, Otto Candies, Jr., John Hudgens, DCC Ventures LLC, Otto Candies LLC, NJK Holding Corporation, Otto Candies III, John Ellingboe, Daniel Erickson, Larry Lenig, Jr., Bruce C. Gilman, Eugene DePalma, and Wade Abadie, Jr., Cause No. 2008-64385 in the 129th Judicial District of Harris County “ordered that the SLC Report be protected from full disclosure” (Debtors’ Obj. ¶ 3), Defendants should be prevented from viewing it. But disclosure of the Report to the Defendants, the minority shareholders of the Debtor at the time the Report was produced who were injured by the actions of Kazeminy and Candies, is clearly not “full disclosure.” This Court has the authority to allow production of the Report to the Defendants on a confidential basis, and may, at this time, restrict the use of the Report to determination of the issues regarding the ownership of the Claims. Under such circumstances, there is no harm to the Debtors if the Report is produced by McKim.

The Debtors Have Waived Their Attorney-Client Privilege Regarding the Report

8. The Debtors then assert that the Report is subject to an attorney-client privilege and that such privilege may not be waived by McKim. But the Debtors themselves waived any such privilege when they produced the Report to counsel

for Deepwork, Inc., a co-Defendant. Under Rule 502 of the Federal Rules of Evidence and Rule 511 of the Texas Rules of Evidence, such disclosure to a third party operates as a waiver of the attorney client privilege, and the Debtors' cannot now reassert a privilege that they – or a predecessor – have previously waived.

Conclusion

For the foregoing reasons, Defendants respectfully request that the Court allow the production of the Report to the Defendants by McKim.

Dated: February 5, 2010

Respectfully submitted,

PADUANO & WEINTRAUB LLP

/s/ Anthony Paduano

Anthony Paduano

(*pro hac vice* admission pending)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 5, 2010, a true and correct copy of the foregoing document was served on all parties on the attached service list by electronic means as listed on the court's ECF noticing system and by electronic mail as indicated.

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